Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 02(F)-78–12 OF 2011(B)

HASHIM YUSOFF, AHMAD MAAROP, ZAINUN ALI, SULONG MATJERAIE AND JEFFREY TAN FCJJ

18 JANUARY 2013

Companies and Corporations — Debenture — Power of attorney — Debenture-holder appointed as attorney of borrower under debenture — Whether debenture-holder's private sale of properties secured under debenture as attorney of borrower valid — Whether company could grant irrevocable power of attorney ('PA') for valuable consideration — Whether such PA ceased to have effect upon winding up of donor company — Whether secured creditor's realisation of securities in company was 'disposition of property' under s 223 of the Companies Act 1965 — Whether leave of court to realise securities not necessary

The first respondent ('UMBC') had granted the appellant an overdraft facility secured by a debenture which included a fixed charge over seven pieces of land ('the lands') and a charge under the National Land Code ('NLC') over the lands. The debenture contained an irrevocable power of attorney ('PA') granted by the appellant in favour of UMBC. The appellant defaulted under the facility and, at the instance of another creditor, was wound up by order of court. While the appellant was still under liquidation UMBC gave notice that it would exercise its power under the PA to sell the lands and it entered into a sale and purchase agreement ('SPA') with the second respondent for that purpose. The appellant, in the meanwhile, obtained a stay of the winding up order and applied to the High Court to set aside the SPA but the application was dismissed. The appellant then appealed to the Court of Appeal which dismissed the appeal by majority. The Federal Court granted the appellant leave to appeal. The appellant contended that: (i) the sale of the lands was invalid on the principles enunciated by the then Supreme Court in *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('*Kimlin*') as UMBC had not adhered to a judicial sale in accordance with the NLC; (ii) only a natural person, and not a company, could grant a PA expressed to be irrevocable and given for valuable consideration considering the language used in s 6(1)(a) of the Powers of Attorney Act 1949 ('the Act'); (iii) even if such a PA was valid it ceased to have effect upon the winding up of the donor company; and (iv) the sale of the lands was void for failure of UMBC

to obtain leave of the winding up court to make the disposition under s 223 of the Companies Act 1965 ('CA'). A

Held, dismissing the appeal with costs:

(1) UMBC sold the lands and signed the SPA as attorney for the appellant under an irrevocable PA. Consequently, the sale was carried out by the appellant/chargor and thus *Kimlin*'s case was not applicable to the present appeal. *Kimlin* was concerned with the narrow issue of whether a receiver and manager appointed under a debenture, but not as attorney of the borrower, could sell lands charged under the NLC without taking proceedings under the NLC. That part of the judgment in *Kimlin* which referred to 'power of attorney or otherwise' was at best only obiter dicta since the debenture in that case did not contain a PA clause as was the case here (see paras 30, 39 & 43). B C

(2) Reading both s 3(1)(a) of the Act and Form II in the First Schedule to the Act, it was clear that a company was competent to grant a power of attorney provided there was scrupulous compliance with the form of authentication of the PA (see para 61). D

(3) The winding up order against the appellant did not vitiate, nullify or revoke the power of attorney the appellant had expressly granted to UMBC in the debenture. The appellant was only under winding up at the time the SPA was entered into. It was not dissolved nor had it ever been. In any event, the appellant had obtained a permanent stay of the winding up proceedings under s 243 of the CA which resulted in the discontinuance and termination of the winding up proceedings (see paras 65, 72–73). E F

(4) Section 6(1)(a) of the Act protected a purchaser who purchased property from a donee of a power of attorney expressed to be irrevocable and given for valuable consideration. The clear language of s 6(1)(a) '… or by death, marriage, mental disorder, unsoundness of mind or bankruptcy of the donor of the power' was unequivocal in its stand as to instances when a power of attorney could not be revoked (see para 74). G

(5) The sale of the lands by UMBC to the second respondent was valid and it was not a disposition within the meaning of s 223 of the CA. That section did not apply to the realisation by a secured creditor of assets of a company charged as security (see paras 89, 92–93). H

[Bahasa Malaysia summary I

Responden pertama ('UMBC') telah memberikan perayu kemudahan overdraf yang dijamin oleh debentur termasuk caj tetap ke atas tujuh bidang tanah ('tanah-tanah tersebut') dan gadaian di bawah Kanun Tanah Negara ('KTN') ke atas tanah-tanah tersebut. Debentur itu mengandungi surat kuasa wakil

('SKW') yang diberikan oleh perayu bagi pihak UMBC. Perayu telah gagal di bawah kemudahan itu dan, dalam kes satu lagi pemiutang, telah digulungkan melalui perintah mahkamah. Semasa perayu masih dalam penyelesaian UMBC telah memberi notis bahawa ia akan menggunakan kuasanya di bawah SKW untuk menjual tanah-tanah tersebut dan ia telah memasuki perjanjian jual beli ('PJB') dengan responden kedua bagi tujuan tersebut. Perayu, sementara itu, telah memperoleh penggantungan perintah penggulungan itu dan memohon Mahkamah Tinggi untuk mengetepikan PJB itu tetapi permohonan itu telah ditolak. Perayu kemudian telah merayu kepada Mahkamah Rayuan yang telah menolak rayuan melalui majoriti. Mahkamah Persekutuan telah memberikan perayu kebenaran untuk merayu. Perayu berhujah bahawa: (i) jualan tanah-tanah tersebut adalah tidak sah atas prinsip-prinsip yang dinyatakan dalam Mahkamah Agung pada masa itu dalam kes *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('*Kimlin*') kerana UMBC tidak mematuhi jualan kehakiman menurut KTN; (ii) hanya orang sebenar, dan bukan syarikat, boleh memberikan SKW yang dinyatakan sebagai tidak boleh dibatalkan dan diberikan untuk balasan berharga dengan mengambil kira bahasa yang digunakan dalam s 6(1)(a) Akta Surat Kuasa Wakil 1949 ('Akta tersebut'); (iii) jikapun SKW itu sah ia tidak lagi mempunyai kesan setelah penggulungan syarikat pemberi; dan (iv) jualan tanah-tanah tersebut adalah tidak sah kerana kegagalan UMBC untuk memperoleh kebenaran berhubung penggulungan mahkamah untuk membuat penyelesaian di bawah s 223 Akta Syarikat 1965 ('AS').

Diputuskan, menolak rayuan dengan kos:

(1) UMBC telah menjual tanah-tanah tersebut dan menandatangani PJB sebagai wakil kuasa untuk perayu di bawah SWK yang tidak boleh dibatalkan. Berikutan itu, jualan itu telah dilaksanakan oleh perayu/penggadai dan oleh itu kes *Kimlin* tidak terpakai dalam kes ini. *Kimlin* adalah berkenaan isu sama ada penerima dan pengurus yang dilantik di bawah debentur, tetapi bukan sebagai wakil kuasa peminjam, boleh menjual tanah-tanah yang digadaikan di bawah KTN tanpa memasukkan prosiding di bawah KTN. Bahagian penghakiman dalam kes *Kimlin* yang dirujuk kepada 'power of attorney or otherwise' hanya dianggap sebagai obiter dicta oleh kerana debentur dalam kes tersebut tidak mengandungi fasal SKW sebagaimana dalam kes ini (lihat perenggan 30, 39 & 43).

(2) Dengan membaca bersama s 3(1)(a) Akta tersebut dan Borang II dalam Jadual Pertama kepada Akta tersebut, adalah jelas bahawa syarikat berkompeten untuk memberikan surat kuasa wakil terhadap syarat terdapat pematuhan ketat terhadap borang pengesahan SKW itu (lihat perenggan 61).

(3) Perintah penggulungan terhadap perayu tidak menjadikan tidak sah, memansuh atau membatalkan surat kuasa wakil yang jelas diberikan oleh perayu kepada UMBC dalam debentur itu. Perayu hanya digulung semasa PJB tersebut dimasuki. Ia tidak dibubarkan atau telah dibubarkan. Dalam apa keadaan, perayu telah memperoleh penggantungan tetap berhubung prosiding penggulungan itu di bawah s 243 AS yang mengakibatkan prosiding penggulung tidak disambung dan ditamatkan (lihat perenggan 65, 72–73).

(4) Seksyen 6(1)(a) Akta tersebut melindungi pembeli yang telah membeli hartanah daripada penerima surat kuasa wakil yang jelas tidak boleh dibatalkan dan diberikan dengan balasan berharga. Bahasa s 6(1)(a) yang jelas '… or by death, marriage, mental disorder, unsoundness of mind or bankruptcy of the donor of the power' adalah tak taksa dalam pendiriannya dalam keadaan di mana surat kuasa wakil tidak boleh dibatalkan (lihat perenggan 74).

(5) Jualan tanah-tanah tersebut oleh UMBC kepada responden kedua adalah sah dan ia bukan satu penyelesaian dalam maksud s 223 AS. Seksyen tersebut tidak terpakai untuk penyelesaian oleh pemiutang bercagar berhubung aset-aset syarikat yang digadaikan sebagai cagaran (lihat perenggan 93, 89 & 92).]

Cases referred to

A-G v Lamplough (1878) 3 Ex D 214, CA (refd)

Bank Bumiputra Malaysia & Ors v Kimlin Housing Development Sdn Bhd (in receivership) [1993] 2 MLJ 126, HC (refd)

French's (Wine Bar) Ltd, Re [1987] BCLC 499, Ch D (refd)

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 AMR 585, FC (refd)

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager)(in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (not folld)

Margart Pty Ltd (in liq); Hamilton, Re v Westpac Banking Corp & Anor (1984) 2 ACLC 709, SC (refd)

Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86, FC (folld)

Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in liquidation) & Anor [2000] 3 MLJ 304; [2000] 3 CLJ 127, CA (refd)

MW Lee & Sons Enterprise Ltd, Re [1999] 2 HKL 698 (refd)

Sime Diamond Leasing (M) (in liquidation) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd [1997] 1 MLJ 499; [1997] 2 CLJ 775, CA (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)

Vijayalakshmi Devi d/o Natchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830; [1995] 2 CLJ 392, CA (refd)
Watson v King (1815) 171 ER 87 (refd)
Wellington Steam Ferry Co Ltd (in liq) v The Wellington Deposit, Mortgage & Building Association Ltd (1915) 34 NZLR 913, SC (refd)
Wily & Anor v Commonwealth of Australia (1996) 19 ACSK 720 (refd)

Legislation referred to

Companies Act 1965 ss 35(6), 223, 240, 243
Companies (New South Wales) Code [AU] s 368
Courts of Judicature Act 1964 s 96
National Land Code
Powers of Attorney Act 1949 ss 3(1)(a), 6(1)(a), First Schedule, Form II

Appeal from: Civil Appeal No B-02–149 of 2005 (Court of Appeal, Putrajaya)

Bastian Vendargon (Gene Anand Vendargon with him) (YS Woo & Proctor) for the appellant.
Lambert Rasa-Ratnam (Andrew Chiew with him) (Lee Hishammuddin Allen & Gledhill) for the first respondent.
SS Muker (Samreet Singh with him) (Lovelace & Hastings) for the second respondent.

Zainun Ali FCJ (delivering judgment of the court):

[1] This court was invited in this appeal to answer four questions in which leave against the decision of the Court of Appeal was granted to the appellant on 27 August 2010.

[2] The issues raised elicited varying response in the courts below. The High Court decision was affirmed by a majority in the Court of Appeal.

BRIEF FACTS

[3] The first respondent granted an overdraft facility of RM1.5m to the borrower ('the appellant') on 16 September 1983 ('the facility').

[4] It is important to note that the said facility was secured by a debenture ('debenture') dated 10 March 1984 which included a fixed charge over seven pieces of land ('the lands') and a charge under the National Land Code over the lands, created by the first respondent ('charge').

[5] The debenture contains a power of attorney ('the PA') in s 6.06, in favour of the first respondent for valuable consideration. The said PA is one which is expressed to be irrevocable.

[6] On 24 July 1987, the facility went into default. The first respondent then demanded repayment of the facility. A

[7] Following this, on the application of one Automotive Corp Sdn Bhd, the appellant was ordered to be wound up on 29 September 1994. B

[8] On 16 May 1995, the first respondent gave notice to the appellant that it would exercise its power to sell the land, pursuant to section 6.05 of the debenture. C

[9] As a prelude, the first respondent exercised its rights under section 6.02(a) of the debenture by appointing a receiver and manager, who issued an advertisement on 11 July 1995 to sell the land. D

[10] About a week later ie on 17 July 1995, the directors of the appellant filed an action at the Shah Alam High Court, for an originating summons ('the action'), to declare the sale of the land null and void.

[11] The High Court dismissed the action on 29 May 1996. The directors' appeal against the dismissal of the action was heard by the Court of Appeal. It was also dismissed. E

[12] Thereafter, on 24 October 1995, the first respondent as attorney of the appellant (pursuant to the abovementioned irrevocable power of attorney granted by the appellant under section 6.06 of the debenture) entered into a sale and purchase agreement with the second respondent for the sale of the land ('SPA'). F

[13] However the appellant managed to pay the monies owed to Automotive Corp Sdn Bhd and thus on 4 November 1996, the appellant obtained a stay of the winding up order of 29 September 1994. G

[14] The appellant then filed this originating summons on 13 May 1997, to set aside the sale of the land by the first respondent to the second respondent. H

[15] The learned High Court judge heard and dismissed the originating summons on 3 January 2005. The appellant then filed an appeal on 2 February 2005 to the Court of Appeal and after having heard the appeal, it was dismissed by majority. I

[16] All three judges of the Court of Appeal furnished separate written grounds for their decision in which one was a minority view.

[17] The application for leave was granted on 27 August 2010, we were invited to answer the following four questions:

(a) Question 1

When a chargee sells charged property to realise its loan, without recourse to and compliance with the National Land Code ('NLC'), and without the consent of the chargor, is that sale void, as stated in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager)(in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 (SC) irrespective of whether the sale was by use of a power of attorney ('PA') as opposed to a debenture?

(b) Question 2

Can a PA for valuable consideration and expressed to be irrevocable, be granted by a company as donor (as opposed to a natural person) pursuant to s 6(1)(a) of the Powers of the Attorney 1949 ('PA Act')?

(c) Question 3

In respect of a power of attorney (PA), expressed to be for valuable consideration and irrevocable pursuant to s 6(1)(a) of the PA Act 1949, does such a PA survive and remain valid upon the winding up of a donor company?

(d) Question 4

Is a disposition of property belonging to a company in liquidation which is held as a security or otherwise, without leave of the winding up court required by s 223 of the Companies Act 1965 void?

THE COURT'S VIEW

[18] We shall answer the questions posed in the order they are stated.

QUESTION 1

[19] To answer this question, it would be instructive to understand what was

the ratio in *Kimlin Housing Development Sdn Bhd(Appointed receiver and manager)(in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('*Kimlin*'). A

[20] In *Kimlin*, the issue was whether a receiver and manager appointed under a debenture can sell lands charged under the National Land Code. B

[21] It is commonplace that a creditor is entitled to pursue all remedies available to him in law and in equity for the purpose of recovering monies due to him. The creditor can exercise this at any time whether contemporaneously or simultaneously or successively. He can also choose not to pursue it at all. C

[22] In *Kimlin*, the borrower company ('the appellant') was the registered proprietor of certain lands ('the land'). The appellant executed two legal charges ('the charges') under the NLC over the lands in favour of Bank Bumiputra (M) Bhd ('the first respondent') with a view to securing banking facilities granted to the appellant. Thereafter the appellant executed a debenture in favour of the first respondent to secure various banking facilities ('the debenture') in which the appellant created both a fixed and a floating charge. One of the provisions of the debenture was for the appointment of a receiver and manager ('R&M') who have certain powers. D E

[23] Subsequently events occurred upon which the powers to appoint the R&M under the debenture became exercisable. Pursuant to such powers, the bank duly appointed the second, third and fourth respondents as the R&M of the appellant. The R&M applied to the High Court by way of originating summons for leave to sell the lands ('the application'), since under the debenture appointing them (the R&M) there was no express provisions appointing the R&M as attorneys of the appellant; thus in its bid to sell the land without resorting to proceedings under the NLC to obtain a judicial sale, the R&M made the application for leave to sell the land to the High Court, by way of originating summons. F G

[24] However the appellant then went into liquidation and the application by the R&M was opposed by the liquidator. H

[25] In the High Court (see *Bank Bumiputra Malaysia & Ors v Kimlin Housing Development Sdn Bhd (in receivership)* [1993] 2 MLJ 126) the learned judge held that: I

(a) the R&M were entitled to sell the lands which were subject to the charges without taking proceedings under the NLC to obtain a judicial sale; and

A (b) the fact that a company has been put into liquidation does not affect the securities held by the R&M, at least not until the secured creditors have been fully paid off.

[26] The secured creditors could therefore dispose of the securities despite the liquidation. The trial judge went on to say that the R&M were entitled to do what the debenture provided for.

[27] The aggrieved liquidator then appealed against the said High Court decision. The judgment of the (then) Supreme Court at p 823A reads as follows:

> … no power of sale can be conferred by way of a debenture or power of attorney or *otherwise*, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred as a chargee himself omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owners. (Emphasis added.)

[28] Since the questions posed in *Kimlin* concerned only the R&M, the above passage is ratio decidendi only as regards the power of sale which was exercised by the R&M appointed under a debenture.

[29] In the Court of Appeal, the majority comprising Low Hop Bing JCA and Zaharah Ibrahim JCA held that *Kimlin* did not apply.

[30] We agree with the majority in the Court of Appeal that the other part of the judgment in *Kimlin* which referred to 'power of attorney or otherwise' and 'power of attorney' is at best, only obiter dictum, albeit when the questions posed there concerned only the R&M, since the debenture there did not contain a PA clause.

[31] Thus in *Kimlin*, the decision has nothing to do with an attorney appointed pursuant to a PA clause in the debenture, as is apparent in this appeal.

[32] It would also be instructive to note that *Kimlin* was referred in extenso in *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 AMR 585 (FC).

[33] Firstly the Federal Court in *K Balasubramaniam* speaking through Siti Norma Yaakob then FCJ, held that:

(a) *Kimlin* was decided on its peculiar facts;

(b) the issue of law raised in *Kimlin* was whether a R&M appointed under a debenture can proceed to sell the charged land by just obtaining the leave of the court without taking any proceedings under the Code; and

(c) the subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale.

[34] That was the decision in *K Balasubramaniam*. Meanwhile the Court of Appeal in the instant appeal concluded that:

> … It is therefore my considered opinion that the principles of *Kimlin* should be restricted in scope and limited to the powers of the receiver and manager appointed under a power contained in an instrument to dispose of lands charged under the Code.

[35] It is our view that *Kimlin* has limited scope and is at once distinguishable on the facts.

[36] In the light of the above, we agree with learned counsel for the first respondent that the question as formulated is confusing, because it postulates a situation that a chargee of land which is charged both under the National Land Code and also under a debenture, cannot, on the authority of *Kimlin*, exercise its right of sale, pursuant to an irrevocable power of attorney given for valuable consideration, under the debenture to sell the land.

[37] As can be seen, *Kimlin* is no authority for the above proposition and thus this is not the law.

[38] In *Kimlin*, the facts show that the sale in question was effected by the R&M, as opposed to the facts in this appeal where the sale was done by the first respondent bank as attorney of the appellant borrower, pursuant to the PA; and that in *Kimlin* there was no express provision in the debenture appointing the R&M as attorneys for the borrower while in this appeal, the debenture has an express provision incorporating the PA clause.

[39] We find that *Kimlin* is not applicable to the present appeal since *Kimlin* was concerned with the narrow issue of whether a R&M appointed under a debenture can sell lands charged under the NLC, unlike the position in this appeal where the first respondent sold the lands pursuant to an irrevocable power of attorney that was given as security.

[40] Hishamudin Yunus JCA in dissenting, observed that the issue was whether the sale was undertaken by the chargee (ie the first respondent) or the

chargor (ie the appellant). If the sale was carried out by the chargor, *Kimlin* does not apply, following the ratio in the Federal Court authority of *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86. His Lordship also found that it was 'unrealistic and unfair to regard the sale as a sale undertaken or effected by the chargor' because it was the chargee who was enforcing its security to sell the lands.

[41] As was submitted by counsel of the first respondent, Hishamudin Yunus JCA's dissent is premised on his finding that it was the first respondent who ultimately wanted the land to be sold.

[42] We find that the dissenting view of Hishamudin Yunus JCA did not consider the capacity in which the first respondent sold the land and entered into the SPA with the second respondent.

[43] In this connection, the first respondent sold the land and signed the SPA as attorney for the appellant under an irrevocable power of attorney, which in his judgment he had himself held to be a valid power of attorney. Consequentially with respect, it ought to have then been apparent to His Lordship that the sale was carried out by the appellant/chargor and thus *Kimlin* is not applicable.

[44] As is clear in *Kimlin*, because the debenture did not contain an express provision appointing the R&M as attorney of the borrower (the appellant), then any sale by the R&M would be as agent of the chargee, unlike the instant appeal where the first respondent sold the land as attorney of the appellant/chargor pursuant to an irrevocable power of attorney given for valuable consideration.

[45] In view of the above, our answer to Question 1 is that a sale by a chargor through its attorney, pursuant to an irrevocable power of attorney given for valuable consideration, of land charged under the National Land Code, is valid.

[46] As regards Question 2, this is our view. Since the issue raised did not arise from either the High Court decision and that it was raised for the first time before the Court of Appeal — it can be rephrased in this manner — whether a company can grant a power of attorney.

[47] The Court of Appeal was unanimous in rejecting the appellant's arguments on this issue.

[48] The appellant's argument was that only a natural person and not a company, can grant a power of attorney. A

[49] Low Hop Bing JCA held that a company can grant a power of attorney under s 3(1)(a) of the Powers of Attorney Act 1949 ('PA Act'), read with Form II in the First Schedule. Both Zaharah Ibrahim JCA and Hishamudin Yunus JCA made similar findings. B

[50] In view of the above the first respondent took the position that the above Question 2 does not arise from a decision of the Court of Appeal and was not an issue decided by the Court of Appeal (s 96 of the Courts of Judicature Act 1964; *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51 at pp 80–81. C

[51] It is our view that since the issue is related to the other three questions posed, we are minded to answer this question but limiting its scope to what was alluded to above ie whether a company can grant a power of attorney. D

[52] The said power of attorney is contained in s 6.06 of the debenture dated 10 March 1984 executed under seal and is expressed to be irrevocable, given for valuable consideration. E

[53] At the time it was created the Powers of Attorney Ordinance 1949 was in force. It was revised in 1990 and became the Power of Attorney Act 1949. The Ordinance and the Act are identical in all material respect. F

[54] To begin with the law relating to powers of attorney is governed by common law — the law of agency and statute. G

[55] It is the appellant's submission that the donor of a power of attorney must be a natural person or individual and not a company or corporation. H

[56] In our view, inclusive in the issue is whether a company or corporation is competent to create a power of attorney.

[57] In our view, the short answer to this question is — it can, in view of the construction of s 3(1)(a) of the Powers of Attorney Act 1949 and s 35(6) of the Companies Act 1965. I

[58] Section 3(1)(a) of the PA Act 1949 ('s 3(1)(a)'), inter alia, provides that:

A (1) No instrument property to create a power of attorney executed after the commencement of this Act shall have validity to create such power within Peninsular Malaysia unless (a) … the instrument … is authenticated in the appropriate form set out in the First Schedule hereto …

B **[59]** Form II in the First Schedule to the PA Act 1949 is the appropriate form referred to in s 3(1)(a). This form sets out the form of authentication in the case of a power of attorney executed by a company or corporation.

C **[60]** It might be mentioned here that the inclusion of a schedule(s) to an Act of Parliament is commonplace and that it is now an established legislative drafting practice to do so. This is especially true where specific forms are prescribed for the purpose of carrying into effect the sections set out in the main body of the Act. Thus the schedule is to be read and construed as an D integral, essential and operative part of the Act (see *A-G v Lamplough* [1878] 3 Ex D 214, p 229.

[61] Thus when both s 3(1)(a) and Form II are read and construed simultaneously, it is clear that a company is competent to create a power of E attorney, provided of course, there is scrupulous compliance with the form of authentication, as has been done in the PA herein.

[62] Based on the above, the answer to Question 2 (as is confined to the issue F before the Court of Appeal) is simply that a power of attorney can be granted by a company as donor.

[63] Coming to Question 3, ie in respect of a PA expressed to be for valuable consideration and irrevocable pursuant to s 6(1)(a) of the PA Act 1949, does G such a PA survive and remain valid upon the winding up of a donor company, answer given by the Court of Appeal was unanimous, in that based on s 6(1)(a) of the PA Act 1949, the prohibition against the revocation of an irrevocable power of attorney was absolute and is not affected by any winding up order.

H **[64]** The Court of Appeal added that in this appeal, the said power of attorney is an authority coupled with interest and is thus irrevocable at common law. The Court of Appeal also found that the decision of the Federal Court in *K Balasubramaniam* has a strong binding effect. The appellant on the I contrary contended that *K Balasubramaniam* was wrongly decided.

[65] Our short answer to Q3 is this: that upon a careful perusal of the appeal record and in the light of the authority of *K Balasubramaniam*, it is our view that the winding up order made against the appellant at the instance of

Automotive Corp Sdn Bhd, does not vitiate, nullify or revoke the PA which the appellant has expressly granted to the first respondent in the debenture. A

[66] The Federal Court decision of *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in liquidation) & Anor* [2000] 3 MLJ 304; [2000] 3 CLJ 127 (CA) was cited. B

[67] In *Melantrans*, the debenture also contains a validly constituted power of attorney clause which irrevocably appointed the R&M as lawful attorney of the company. The R&M entered into a sale and purchase agreement to sell a lease on the company's behalf. The High Court granted a declaration that the sale and purchase agreement was valid and binding. The said decision was affirmed by the Court of Appeal and upheld by the Federal Court. C

[68] In the instant appeal, it is clear that the sale and purchase agreement ('SPA') was entered into by the first respondent with the second respondent after the appellant was wound up but before it was dissolved. D

[69] It is also our view that, based on the Australian authority of *Wellington Steam Ferry Co Ltd (in liq) v The Wellington Deposit, Mortgage & Building Association Ltd* (1915) 34 NZLR 913, a power of attorney given by a company as security will, if at all, only be revoked upon its dissolution. By way of analogy, a power of attorney given as a security by a natural person is, at common law, revoked when the donor dies (*Watson v King* (1815) 171 ER 87). E F

[70] Based on the above authorities, we find that the decision of the Federal Court in *K Balasubramaniam* was rightly decided when it held that a power of attorney granted by a company is not revoked upon winding up of the company. G

[71] We agree with the observation made by Stout CJ in *Wellington Steam* when His Lordship states that

> What can be done is that, if the company were dissolved, a new trustee could be appointed and the legal estate thus transferred to the defendant, but that can now be done by deed. The case of *In re No 9 Bomoro Road, shows* that. In that case *In re Taylor's Agreement Trusts* was distinguished, and older cases followed. I think also that these cases show that a company must on dissolution be considered as having ceased to exist for any purpose, and in the absence of special statutory provision an attorney cannot be agent of something that does not exist. H I

[72] As had been stated earlier, the appellant was only in winding up at the time the SPA was entered into. It was not dissolved nor has it ever been. In so

far as we are aware, dissolution of a company only occurs when an order is made to dissolve the company under ss 239 and 240 of the Companies Act 1965.

[73] In any event, a permanent stay of the winding up proceedings under s 243 of the Companies Act 1965 was obtained by the appellant, which resulted in a total discontinuance of and termination of the winding up proceedings (see *Vijayalakshmi Devi d/o Natchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830; [1995] 2 CLJ 392).

[74] In the light of the above, s 6(1)(a) of the PA Act 1949 protects a purchaser who purchased property from a donee of a power of attorney expressed to be irrevocable and given for valuable consideration. In our view the clear language of s 6(1)(a) '… or by death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, 'is unequivocal in its stand as to instances when a power of attorney cannot be revoked.

[75] Thus our answer to Question 3 is that a power of attorney survives and remains valid upon the winding up of a donor company.

[76] Coming to the last question in this appeal ie Question 4, the issue is whether leave of the winding up court is required by s 223 of the Companies Act 1965, in the disposition of property belonging to a company in liquidation which is held as a security or otherwise.

[77] The appellant's position is that the sale of the land was contrary to s 223 of the Companies Act 1965 since leave of the court is a requisite before the first respondent can sell the land.

[78] In the Court of Appeal, the majority held that:

> Section 223 did not apply.
>
> We find that s 223 do not apply to disposal of assets charged as security. We do not agree with the appellant that the sale was void under the said section in relation to a sale of charged properties by a R&M.

[79] Zaharah Ibrahim JCA made similar findings as above.

However Hishamudin Yunus JCA held otherwise. His Lordship's dissent included the view that s 223 applies to the sale of any property belonging to the company after the commencement of winding up and hence, leave of court is required. He was of the view that *Kimlin* applied in this case.

[80] His Lordship added that s 223 applied because 'a sale of a property of a company that has been wound up had taken place without the permission of the winding up court'.

[81] In our view, the land being subject to the charge and a fixed charge under section 3.01 of the debenture, meant that the sale of the land was not a disposition under s 223 of the Companies Act 1965.

[82] For this purpose, one has to look at the underlying rationale of s 223 of the Companies Act 1965.

[83] Section 223 of the Companies Act 1965 provides as follows:

> 223 AVOIDANCE of DISPOSITION of PROPERTY, ETC
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

[84] From a reading of s 223 of the Companies Act 1965 and the relevant authorities cited, it is our view that s 223 is inapplicable in the instant appeal since the first respondent was in this case, exercising its right under a security when it sold the land.

[85] Our view is fortified by the decision of the Supreme Court of New South Wales in *Re Margart Pty Ltd (in liq); Hamilton v Westpac Banking Corp & Anor* (1984) 2 ACLC 709 at pp 710–714 where Helsham CJ considered s 368 (which is similar to our s 223), in particular the phrase 'any disposition of the property of the company, where he held that s 368 has no application to assets that are not free assets of the company which the company is beneficially entitled to and which can be realised for the benefit of its creditors. In other words, s 368 as is s 223 of our Companies Act 1965, *is not intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when the creditor is entitled to have them.* (Emphasis added.)

[86] The following passage of Helsham CJ's judgment is particularly relevant:

> … What lies behind the section is the prevention of the improper alienation and disposition of the company's property. I do not believe it was intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them.

A To hold otherwise would mean that assets covered by a fixed charge, or their momentary equivalent, could not with impunity be taken by or paid to the person having the benefit of the charge at any time after the commencement of the winding up.

B Anything done by the company or in receiver to pay the charge or transfer assets to the charge would be void. No bank or other person holding in charge under which moneys had become payable could take payment without the precaution of obtaining what is known as a validating order. I do not believe that s 368 was intended to operate in that way.

C

[87] *Re Margart* has been considered and followed both in Malaysia and in other parts of the Commonwealth (see *Re French's (Wine Bar) Ltd* [1987] BCLC 499 (UK), *Re MW Lee & Sons Enterprise Ltd* [1999] 2 HKL 698 (Hong Kong), *Wily & Anor v Commonwealth of Australia* (1996) 19 ACSK 720 and D *Sime Diamond Leasing (M) (in liquidation) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd* [1997] 1 MLJ 499; [1997] 2 CLJ 775).

[88] It is clear from the above that the sale of the land by the first respondent to the second respondent is not a disposition within the meaning of s 223 of the E Companies Act 1965.

[89] In fact even the minority judgment in the Court of Appeal (Hishamudin Yunus JCA) conceded that if an application for leave was sought under s 223, His Lordship would have allowed it. F

[90] This in itself is indicative of the learned judge's recognition that s 223 of the Companies Act was not intended to prohibit disposition of secured assets.

G **[91]** In view of the above, we would answer Question 4 by holding that the realisation by a secured creditor of assets of a company charged as security does not fall within s 223 of the Companies Act 1965.

H **[92]** Thus our unanimous decision is that — we would answer the four questions posed in favour of the first and second respondents. As a consequence we find the sale of the land by the first respondent to the second respondent to be valid.

I **[93]** We therefore dismiss this appeal with costs.

[94] Costs.

[95] Deposit to be refunded.

Appeal dismissed with costs.

Reported by Ashok Kumar